

STATE OF MICHIGAN
COURT OF APPEALS

CYNTHIA ROOF and LEONARD ROOF,

Plaintiffs-Appellants,

v

DR. PEDRITO GALUPO and THORN
HOSPITAL CORPORATION,

Defendants-Appellees.

UNPUBLISHED
February 26, 2002

No. 227166
Lenawee Circuit Court
LC No. 98-007986-NH

Before: Smolenski, P.J., and Doctoroff and Owens, JJ.

MEMORANDUM.

Plaintiffs appeal as of right the trial court's order granting defendants' motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Cynthia Roof developed complications from surgery performed by defendant Galupo. On February 5, 1998 plaintiffs gave notice of intent to file a medical malpractice case, and filed suit the same day. The complaint was accompanied by an affidavit of merit, as required. MCL 600.2912d(1). Defendants moved for summary disposition, arguing that plaintiffs' failure to wait 182 days to file suit after serving the notice of intent, as required by MCL 600.2912b(1), rendered the complaint defective. The parties stipulated to the dismissal of the suit without prejudice.

On August 31, 1998 plaintiffs filed the instant suit. The complaint was not accompanied by an affidavit of merit. Plaintiffs did not file an affidavit before the statute of limitations, as tolled during the notice of intent period, expired. Defendants moved for summary disposition pursuant to MCR 2.116(C)(7), arguing that for purposes of tolling the statute of limitations, the filing of a complaint without an affidavit was insufficient. *Scarsella v Pollak*, 232 Mich App 61, 64; 591 NW2d 257 (1998), aff'd 461 Mich 547; 607 NW2d 711 (2000). The trial court denied the motion, reasoning that because plaintiffs filed an affidavit in the first case, defendants were not prejudiced. On reconsideration the trial court granted defendants' motion for summary disposition, acknowledging that the *Scarsella* mandated dismissal of plaintiff's lawsuit with prejudice.

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

Plaintiffs argue that the trial court erred by granting defendants' motion for summary disposition. In *Scarsella*, our Supreme Court held that if a medical malpractice plaintiff fails to file an affidavit of merit within the limitations period, as required by MCL 600.2912d(1), the filing of a complaint is "ineffective" and does not toll the statute of limitations. *Scarsella, supra* at 553. Here, plaintiffs failed to file an affidavit of merit for the second complaint—the complaint at issue here—within the limitations period. Consequently, the trial court did not err by granting defendant's motion for summary disposition and dismissing plaintiff's case with prejudice. *Id.* at 549-550.

Affirmed.

/s/ Michael R. Smolenski
/s/ Martin D. Doctoroff
/s/ Donald S. Owens